

**Before the
Federal Communication Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities)	CC Docket No. 02-33
)	
Universal Service Obligations of Broadband Providers)	
)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements)	CC Dockets Nos. 95-20, 98-10

**Comments Of:
Fred Williamson and Associates, Inc. (“FW&A”)
On behalf of:**

**Chouteau Telephone Company, an Oklahoma ILEC
H&B Telephone Communications, Inc., a Kansas ILEC
Moundridge Telephone Company, Inc., a Kansas ILEC
Pine Telephone Company, Inc., an Oklahoma ILEC
Pioneer Telephone Association, Inc., a Kansas ILEC
Totah Telephone Company, Inc., a Kansas and Oklahoma ILEC
Twin Valley Telephone, Inc., a Kansas ILEC
(Collectively, “ILECs”)**

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BACKGROUND

The ILECs are small rural LECs who have an interest in the outcome of this proceeding because they provide broadband facilities that allow end users to access Internet Service Providers (ISPs) and the Internet. Deployment of broadband facilities that allow access to ISPs and the Internet in small rural areas is much more costly per subscriber than deployment in non-rural areas. This is primarily due to the low population density that exists in rural areas. The broadband facilities and services the ILECs provide are primarily interstate services whose rates are governed by the National Exchange Carrier Association (NECA). Revenues for small rural LECs' interstate broadband services are remitted to the NECA pool and costs for the broadband services are assigned to and recovered from the NECA pool. Deployment of broadband facilities and services in many small rural areas that allow end users to access ISPs and the Internet at reasonable rates would not be possible without those LECs having the ability to recover the associated costs from the NECA Pool.

SUMMARY OF COMMENTS

Broadband Internet access service (and the facilities underlying this service), like dial-up Internet access is a telecommunications service that is subject to the Commissions rules. The service is interstate and tariffed in the interstate jurisdiction. The Commission's logic that wireless broadband Internet access service does not (a) Constitute two components (telecommunications broadband Internet access service and information service) of an integrated service (for an incumbent LEC that provides transmission facilities to an affiliated ISP) or (b) Constitute separate telecommunications broadband

access and ISP information service for unaffiliated incumbent LECs and ISPs, is incorrect and flawed. In both cases, these are two separate service providers, not a single providing entity, as assumed by the Commission. First, there is the incumbent LEC that provides the broadband access facilities or service. This is sold as a telecommunications service for a fee directly to the public and offers a transparent telecommunications path that, as sold, does not change the form or content of information transmitted by the broadband access facilities. Second, there is the ISP service provider which, in conjunction with the end-user's computing equipment, uses the telecommunications broadband access facilities to upload and download information, change its content, store it, etc. The ISP, as the Act states, provides an information service that allows the end-user to acquire, generate or make available information via telecommunications. There is no valid reason to conclude, as the Commission has, that Congress' statutory language regarding providing information via telecommunications meant that the transmission component is embedded within, and not distinct from information service.

The goals articulated by the Commission are not met by classifying wireline broadband access as an information service. It is much more likely that broadband deployment will be facilitated and the goal of ubiquitous availability advanced by classifying wireline broadband access as a telecommunications service because all ISPs, not just those affiliated with the broadband facilities provider, will have broadband access to end-users on the same terms and conditions. Competition among ISPs will be encouraged, not curtailed. This competition will lead to an increased number of competitive ISP options for consumers and consequently increased demand for broadband services.

A consistent analytical framework across the various broadband platforms currently exists and is not harmed by continuing to classify wireline broadband Internet access as a

telecommunications service. In the cable modem proceeding, further consistency can be assured by requiring cable providers to allow equal access for ISPs to its broadband transmission facilities on the same terms and conditions.

Classifying wireline broadband Internet access facilities as a telecommunications service, maintaining the current Computer II and III requirements and eliminating the line sharing and line splitting requirements will allow incumbent LEC broadband services to exist in a minimal regulatory environment and minimize regulatory burdens and costs. On the other hand, classifying these facilities as information and requiring additional Part 64 and Section 254(k) cost allocations will significantly increase the costs of incumbent LECs.

Finally, the preservation of universal service will be enhanced if all providers of broadband service, as well as the ISP providers of information services, are required to contribute to universal service and to contribute on a consistent and non-discriminatory basis. Hopefully this issue will be dealt with either in this proceeding or in the Commission's universal service contribution proceeding.

BROADBAND FACILITIES OF RURAL LECs MUST BE REGULATED AND RECOVERED FROM THE NECA POOL IN ORDER TO PROMOTE CONTINUED BROADBAND INVESTMENT IN THE AREAS THEY SERVE

If the Commission does decide to classify wireline broadband Internet access as information service, as FW&A commented in the LEC broadband proceeding,¹ the FCC should not deregulate the wireline broadband access facilities of small rate of return LECs that serve the rural broadband service market at this time. Rate of return LECs serve significantly different markets than do price-cap LECs and require the continued support of the NECA pool to achieve the goal of section 706 of the Act in the rural areas

¹ CC Docket No. 01-337.

they serve. Deployment of broadband services in many small rural areas at reasonable rates would not be possible without those LECs having the ability to recover the associated costs from the NECA Pool. To promote more aggressive deployment of broadband facilities and services in rural areas and to incite small rural rate of return LECs to continue making the substantial investments necessary to provide broadband services in the rural areas they serve, the Commission should consider different treatment for non-rural and rural LECs. The Commission should insure that rural LECs continue to be able to assign broadband costs to the interstate jurisdiction to be recovered via the NECA pool.

TENTATIVE CONCLUSIONS AND QUESTIONS POSED AND BY THE FCC

In this proceeding, the FCC plans to establish “...the appropriate legal and policy framework, under the Communications Act of 1934, as amended, for broadband access to the Internet provided over domestic wireline facilities.”² The Commission seeks to determine the appropriate classification (information or telecommunications service) of wireline Internet broadband services and to evaluate the regulatory implications of that classification.³ This proceeding is set against the backdrop of past Commission proceedings and Commission rules which provide that:

- Wireline broadband transmission is a tariffed telecommunications service when provided either to an affiliated or non-affiliated ISP.
- If an incumbent LEC self provisions the broadband access for its own ISP or information service offerings, it must purchase or impute the broadband

² FCC 02-42, Notice of Proposed Rulemaking, Released February 15, 2002, paragraph 1.

³ Id., paragraph 9.

access from the same tariff that would be used by non-affiliated or independent ISPs.

- Wireline broadband facilities must be offered as unbundled network elements (line sharing or line splitting) to Competitive Local Exchange Carriers (CLECs).

These requirements were enacted to insure that incumbent LECs provided non-discriminatory wireline broadband Internet access to end- users by ISPs, which are not affiliated with the incumbent LEC and CLECs that sought to provide broadband Internet access. Broadband facilities that provided this access service either to non-affiliated ISPs or CLECs, or for the incumbent LEC's own provision of information services, were and are now regulated telecommunications facilities. As a consequence, broadband facility costs were and are assigned to the interstate jurisdiction and are recovered by rate-of-return companies such as the ILECs from interstate tariffed rates and the NECA pool.

The analysis by the Commission in this proceeding is part of a larger evaluation of broadband services in a set of proceedings including the Cable Modem proceeding⁴ and the Incumbent LEC Broadband proceeding.⁵ These proceedings are evaluating the regulatory requirements of broadband services provided via various (intermodal and intramodal) platforms. The apparent objective of the Commission in these proceedings is to harmonize, to the extent possible, the regulatory requirements of providing broadband service irrespective of the platform (wireline, cable, satellite or wireless).

In this proceeding the Commission tentatively concludes that, as a matter of statutory interpretation, the provision of wireline broadband Internet access is an information service, whether provided to a non-affiliated ISP (directly or via a CLEC through the sale

⁴ GN Docket No. 00-185, 15 FCC Rcd at 19287.

of UNEs) or when that access is used to enable a self provisioned information service provided by the incumbent LEC.⁶ The basic effect of this tentative conclusion is that wireline broadband Internet access services and the wireline facilities used in the provision of these services would be deregulated.

The Commission seeks comment on:

1. Its tentative conclusion, that wireline broadband Internet access services, whether provided over a third party's facilities or self-provisioned facilities, are information services (and not telecommunications services) subject to regulation under Title I of the Act.⁷
2. Its prior conclusion in CC Docket No. 98-147, that an entity is providing a 'telecommunications' service if the entity provides only broadband transmission on a stand-alone basis, without a broadband Internet access service.⁸ What is the appropriate classification (information or telecommunications service) of broadband transmission services offered to independent ISPs?⁹
3. What regulations, if any, should apply to the provision of these services, assuming that wireline broadband Internet access services are information services under the Act?¹⁰
 - a) Should the Bell Operating Company (BOC) access safeguards adopted in the Computer Inquiry proceedings (unbundling basic from enhanced services, offering transmission capacity to non-affiliated enhanced service providers on

⁵ CC Docket No. 01-337, FCC 01-360, 16 FCC Rcd 22745.

⁶ Id., paragraph 17.

⁷ Id., paragraph 16.

⁸ Id., paragraph 26.

⁹ Id., paragraph 51.

¹⁰ Id., paragraph 30.

the same tariffed terms and conditions under which such services are offered to their own enhanced service operations, etc.) be modified or eliminated?¹¹

- b) Should the Computer II unbundling requirements only apply to carriers that have market power in the provision of wireline broadband Internet access service?¹²
- c) If none of the Computer II/III access obligations should apply, should alternative access obligations apply?¹³ How would an alternative regulatory framework reduce regulatory burdens on wireline broadband providers while promoting the availability of broadband to both competitors and consumers?¹⁴
- d) If the requirement that the underlying transmission facilities be made available to non-affiliated ISPs on a nondiscriminatory basis was eliminated:¹⁵
 - How would this affect the deployment of broadband?
 - How would competing ISPs that do not own transmission facilities obtain the inputs they need to provide competing broadband Internet services?
 - Would the removal of unbundling requirements motivate incumbent LECs to only provide broadband transmission as part of integrated information services in order to restrict its availability to non-affiliated ISPs?
- e) If wireline broadband access to the Internet is information service, what are the implications for the incumbent LECs' obligations to provide access to network elements under sections 251 and 252 of the Act?¹⁶

¹¹ Id., paragraph 43.

¹² Id., paragraph 46.

¹³ Id., paragraph 50.

¹⁴ Id., paragraph 51.

- What are the implications on the Commission's line sharing and line splitting rules?
 - Can the Commission compel the unbundling of network elements used in the provision of information services?
- f) If wireline broadband access is an information service, how should joint and common costs of broadband Internet access information service and telecommunications services be allocated under Part 64.901 of the Commissions rules?¹⁷
4. Whether facilities-based providers of broadband Internet access services provided over wireline and other platforms, including cable, wireless and satellite, should be required to contribute to universal service:¹⁸
- a) Should wireline telecommunications carriers and ISPs be subject to the same requirements?
 - b) How would this affect the current revenue based contribution system? How would a connection-based methodology be implemented?
 - c) Are existing cost allocation rules sufficient to allocate the costs of the network between Title II regulated services and Title I information wireline broadband Internet access services? This allocation would be necessary in order to insure that under Section 254(k) of the Act, supported services bear no more than a reasonable portion of the costs associated with facilities used to provide both supported services and unsupported Internet access.

¹⁵ Id., paragraph 52.

¹⁶ Id., paragraph 61.

¹⁷ Id., paragraph 63.

¹⁸ Id., paragraph 16, 65 to 83.

COMMENTS

1. Wireline broadband Internet access facilities and services are telecommunications services, not information services.

The Commission's tentative conclusion that wireline broadband Internet access facilities are information services is based on a flawed statutory interpretation. As the Commission notes¹⁹, the Act defines information service as "the offering of a capability for generating, acquiring, or making available information via telecommunications". The Act also defines telecommunications service as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used". Finally, the Act defines telecommunications as the transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

From these definitions, the Commission has concluded that:

- An entity provides telecommunications only when it provides a transparent transmission path and it does not change the form or content of the information.
- Providers of wireline broadband Internet access offer more than a transparent transmission path to end-users and offer enhanced capabilities.
- Providers of wireline broadband Internet access offer subscribers with the ability to run a variety of applications that fit under the characteristics stated in the information service definition. For instance, an end-user is able to interact with information stored on the facilities of the provider of the wireline broadband

¹⁹ Id., paragraphs 18 and 19.

Internet access service to retrieve files from the World Wide Web and to store files on the provider's computers.

- Wireline broadband Internet access service does not constitute two separate and distinct services (telecommunications transmission versus information), but a single integrated offering to the end-user because Congress recognized that a transmission component is embedded within, and not separate and distinct from, the information service.

FW&A and the ILECs it represents does not believe that this is a valid interpretation of the statutory language. The Commission's logic that wireless broadband Internet access service does not (a) Constitute two components (telecommunications broadband Internet access service and information service) of an integrated service (for an incumbent LEC that provides transmission facilities to an affiliated ISP) or (b) Constitute separate telecommunications broadband access and ISP information service for unaffiliated incumbent LECs and ISPs, is incorrect and flawed. In both cases, these are two separate service providers, not a single providing entity as assumed by the Commission. First, there is the incumbent LEC that provides the broadband access facilities or service. This is sold as a telecommunications service for a fee directly to the public and offers a transparent telecommunications path that, as sold, does not change the form or content of information transmitted by the broadband access facilities. Second, there is the ISP service provider which, in conjunction with the end-user's computing equipment, uses the telecommunications broadband access facilities to upload and download information, change its content, store it, etc. The ISP, as the Act states, provides an information service that allows the end-user to acquire, generate or make available information via

telecommunications. There is no valid reason to conclude, as the Commission has, that Congress' statutory language regarding providing information via telecommunications meant that the transmission component is embedded within, and not distinct from information service. In fact, the LEC- provided wireline broadband Internet access facilities are a distinct and separate service from the information service provided by the ISP. The incumbent LEC provides the telecommunications service that makes the ISP's provision of information service possible at high speeds.

FW&A agrees with the Commission that:

- An entity (the incumbent LEC) provides telecommunications only when it provides a transparent transmission path and it does not change the form or content of the information. This is in fact the broadband access service sold to (a) An end- user directly, who then uses that LEC telecommunications service to connect to the ISP of the end- user's choice or (b) An ISP who packages the telecommunications service with its information service and sells them as a package to an end-user.
- Providers of wireline broadband Internet access services (ISPs) offer more than a transparent transmission path and enhanced capabilities to end-users. ISPs, not incumbent LECs offer subscribers with the ability, via their services to run a variety of applications that fit under the characteristics stated in the information service definition.

These providers, the incumbent LEC and the ISP, are separate entities and offer separate services (broadband access facilities offered by the LEC and information service offered by the ISP) which, when packaged either by the end- user or the ISP, allow the end-user to access the Internet on a high speed basis. There is no factual basis or logic that would

lead one to the conclusion that because the ISP's service is an information service that uses telecommunications transmission facilities to move the information from point to point, that the underlying broadband facilities that transmits the information service is information and not telecommunications facilities or service. In fact, there is substantial evidence to the contrary:

- Information service is provided by ISPs over dial-up telecommunications facilities. The dial-up telecommunications Internet access facilities, like the broadband Internet access facilities are provided by incumbent LECs and are used to move the ISP's information service from the end- user to another point such as the ISP's location to connect to the Internet. Both dial-up and broadband access facilities are telecommunications services – the only substantive difference is speed. The Commission's logic that LEC broadband Internet access facilities are an information, rather than a telecommunications service would mean that all dial-up facilities used to access the Internet are an information, rather than a telecommunications service. This is clearly not the case.
- Broadband Internet access is simply provided by incumbent LEC-provided facilities – loop facilities connecting the end-user to the DSLAM, the DSLAM and transport facilities to connect the end-user's loop to the ISP's location. These facilities only provide the capability to move information, whether voice or high-speed broadband data. The facilities are transparent to the use made of them by the end-user – they are infrastructure. The loop provides voice transmission when directed by the end-user and broadband transmission when directed by the end user. The loop facilities do not, however, become voice or data facilities because of their use – they are still just loop facilities. The Commission's attempt to

define these facilities and the broadband access service they enable as information, would be analogous to defining the copper wire that is used to transport electricity as electricity or the pipes that allow the flow of natural gas as gas, when in fact, these facilities are simply transmission infrastructures for electricity or gas.

FW&A believes that the Commission should recognize that broadband Internet access facilities and service are two distinct services. Broadband access service may be sold on a retail basis to an end-user who then provisions his or her own ISP Internet information service using the broadband access service (loop, DSLAM and transport). Broadband access service may also be sold as a wholesale service to an ISP (affiliated with the LEC or a non-affiliated ISP) who uses the broadband facilities in conjunction with its own ISP information services to provision service to an end-user. In both cases, as Congress envisioned, the ISP's information service is provided via the telecommunications broadband access facilities and service. The telecommunications facilities and broadband access service (like dial-up Internet access facilities and service) do not have the capability to change the form or content of the data transmitted and thus, consistent with the statutory definitions, are telecommunications and telecommunications service. The ISP's services, in conjunction with the end-user's computing equipment, provide the hardware and software to acquire, store, upload, download, etc., the data and thus provide the information service (transported by the LEC broadband access service and facilities), as envisioned by Congress' statutory definitions. Consequently, broadband Internet access service (and the facilities underlying this service), like dial-up Internet access, is a

telecommunications service that is subject to the Commission's rules. The service is interstate and is tariffed in the interstate jurisdiction.

2. Broadband transmission or access service provided to an independent ISP (not affiliated with the LEC), is a telecommunications service.

FW&A believes that the Commission was correct in its prior determination in CC Docket No. 98-147 that broadband service (connecting an end-user to an ISP), is a telecommunications service provided by an incumbent LEC. As discussed above, the broadband transmission, and the facilities which enable that transmission, are telecommunications provided by a telecommunications service, whether provided (a) To an independent, non-affiliated ISP that uses the broadband access transmission to provision Internet information service to an end-user, (b) To an end-user which self provisions his or her Internet ISP information service or (c) To an ISP which is affiliated with the incumbent LEC which self provisions ISP Internet information service using its own broadband access transmission facilities.

3. The current regulatory requirements should be maintained for incumbent LEC broadband Internet access transmission services.

a) BOC Computer II/III requirements should be retained.

The Computer II and III orders require BOCs to unbundle their broadband Internet access transmission service and provide it to non-affiliated ISPs on the same terms and conditions that the BOC would provide the service to an affiliated ISP. FW&A believes that this requirement must be maintained in order to insure that non-affiliated ISPs are able (1) To obtain broadband access transmission facilities (from the end-user to the ISP), in order to provide ISP Internet information service to an end-user and (2) To purchase those facilities at rate levels that will allow the ISP to fairly compete with an ISP that is

affiliated with a BOC and self provisions the facilities provided by the BOC. Maintaining these requirements preserves the maximum flexibility for the end-user consumer. The consumer can either purchase a packaged telecommunications broadband service and ISP Internet information service from the BOC or its affiliated ISP, or it can select the ISP of its choice and that ISP will be able to order BOC provided broadband telecommunications transmission service in order to provide its information service to the end-user. This latter choice will likely be lost to the consumer if the current Computer II and III requirements are eliminated and the customer would be forced to use the ISP that is affiliated with the LEC.

b) The current Computer II and III requirements should be maintained even if the BOCs are found not to have market power because of intermodal competition.

In another related broadband proceeding²⁰, the Commission may determine that BOCs do not have market power over the provision of wireline broadband Internet access telecommunications services because of the existence of other intermodal competitors (cable, satellite, wireless). Even if the Commission does determine that the BOCs do not possess intermodal market power over broadband access facilities, the Commission should maintain the requirement that the BOCs unbundle this service and make it available to end-users and non-affiliated ISPs in order to ensure that competitive choices are available to end-users.

c) Even if the Computer II and III requirements are eliminated, non-affiliated ISPs and end-users must be able to obtain broadband access transmission services.

In order to maintain the benefit of competitive consumer choice of an ISP, the Commission must allow non-affiliated ISPs and end-users to purchase broadband transmission Internet access on a non-discriminatory basis. This telecommunications

²⁰ CC Docket No. 01-337.

service would still need to be tariffed in order to maintain this access. The tariffed rates would still need to be imputed into the BOC integrated broadband transmission access/ISP information service in order to ensure that the BOC rate levels were not discriminatory. The alternative to this regulatory approach is one that would curtail consumer choice, ISP competition and possibly broadband deployment. In order to survive, a non-affiliated ISP wishing to offer broadband ISP Internet access would likely be required to affiliate with a BOC, as has been the case with cable modem service. The negative consequences of this approach are:

- Consumers will be unable to select an ISP of their choice. Instead, they will be required to use the ISP affiliated with the incumbent LEC integrated broadband access service/ISP information service.
- Competition among ISPs will be curtailed. Unless an ISP, in particular smaller ISPs, are able to ally themselves with a BOC, they will likely be barred from providing ISP Internet information services via broadband facilities. Instead they will be relegated to only offering dial-up Internet access service.
- Broadband deployment may be curtailed because the consumer push for broadband, through the ISP of their choice, may be diminished.
- Rural LECs that typically do not offer integrated broadband access service and ISP Internet information service may have difficulty incenting or finding unaffiliated ISPs that will serve their rural areas.

d) Regulations to make broadband telecommunications access service available on a non-discriminatory basis must be maintained.

If the Commission eliminates the requirement to make broadband telecommunications transmission access service available on a non-discriminatory basis, it is likely that the BOCs will have the incentive to offer only integrated broadband telecommunications access service/ISP Internet information service. This is not likely to accelerate deployment of broadband facilities by the BOCs due to existing constraints of capital, technical and customer demand, which will not change even if the Computer II/III requirements are lifted. However, the negative consequences discussed in (c) above will likely occur.

e) Section 251/252 requirements for line sharing and line splitting can be eliminated if the Computer II/III requirements are maintained.

The current Commission requirements for line sharing and line splitting are unnecessary currently and even if the Commission determines that broadband access service is an information service. If the Commission maintains its Computer II/III requirements, a Competitive Local Exchange Carrier (CLEC) can obtain broadband facilities and service for its customers, as do ISPs, on the same terms and conditions that the BOC provides to itself. If the Commission determines, as it should, that broadband access service is a telecommunications service and decides to maintain its line sharing and splitting requirements, these requirements should be limited to large price cap LECs. These requirements provide a powerful disincentive for small rural LECs to place costly broadband facilities in high cost, low population density areas.

f) If facilities-based broadband Internet access services are determined to be information and thus deregulated, the Part 64 rules for allocation of costs to nonregulated services do not require modification

Should the Commission decide to deregulate facilities used to provision broadband access service, it is not necessary for the Commission to modify the current Part 64 Rules that govern the allocation of costs between regulated services and nonregulated services.

The Part 64 FCC Rules govern the allocation of costs between regulated and nonregulated services. For assigning costs to regulated and non-regulated activities, the Part 64 Rules require carriers to follow these principles:

- Costs shall be directly assigned to regulated or nonregulated activities whenever possible.
- Costs which cannot be directly assigned to either regulated or nonregulated are considered common and must be allocated based on the following criteria:
 - a) Common costs should be first allocated based upon direct analysis of their origin.
 - b) When direct analysis is not possible, common costs should be allocated based upon a cost causative linkage or another cost category for which direct analysis is possible.
 - c) If neither of the above is possible, the common costs should be allocated based upon a general allocator, computed by using the ratio of all expenses directly assigned or attributed to regulated and nonregulated activities.

The existing rules are adequate to ensure that all costs, including common costs, attributable to broadband Internet access would be directly assigned or allocated to nonregulated services. These rules, by design, are general in nature and do not need to be tailored to a specific product or service. LECs have utilized these rules for several years in assigning costs attributable to nonregulated services to ensure that universal services and other regulated services do not subsidize nonregulated services. Further, it is not necessary for the Commission to address allocations of costs associated with broadband services that employ new technologies in this proceeding. The Joint Board is in the

process of reviewing and potentially modifying the current separations procedures. Accommodating new technologies is a key item on the Joint Board's agenda. The Commission should not modify or change rules in this proceeding that may possibly conflict with potential findings and recommendations of the Joint Board.

The LECs' provisioning of broadband Internet access services typically utilizes DSL technology and in most cases employs the same loop that is used to provide voice service. As such, there are no additional loop costs incurred or necessary to provide DSL service. This was recognized by the FCC in its adoption of the concept of "line sharing" and has allowed competitors of incumbent LECs to utilize or share the same loop that is used for voice service. For LECs subject to Section 251 Interconnection Requirements, the FCC has required an unbundled network element for "line sharing." Like other unbundled elements, the FCC concluded that the price for this element should be based on Total Element Long Run Incremental Cost (TELRIC). In establishing a price for the "line sharing" element, the FCC concluded that incumbent LECs should "charge no more to competitive LECs for access to shared local loops than the amount of loop costs the incumbent LEC allocated to ADSL services when it established its interstate retail rates for those services."²¹ The FCC further stated, "we find it reasonable to presume that the costs attributed by LECs in the interstate tariff filing to the high-frequency portion of the loop covers the incremental costs of providing xDSL on a loop already in use for voice services."²² The FCC noted, "in setting price for interstate xDSL services... incumbent

²¹ *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 and *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *THIRD REPORT AND ORDER IN CC DOCKET NO. 98-147, FOURTH REPORT AND ORDER IN CC DOCKET NO. 96-98*, Released: December 9, 1999, para. 139

²² *Id.*, para 140

LECs currently attribute little or no loop cost to those services.”²³ The FCC also mentioned:

“[c]urrently, incumbent LECs are recovering the full embedded cost of their loops through revenues received from intrastate business and residential voice services, interstate access charges, and intrastate access charges. Nothing we do today affects the ability of incumbent LECs to continue to receive revenues from those services.”²⁴

These FCC precedents establish that it is not necessary for DSL services to bear a portion of loop costs when it is provided over the same loop used for voice service. This recognizes that the provisioning of DSL services has not caused additional loop costs to be incurred by the LEC. Thus, if DSL access services were deregulated, it would not be appropriate for LECs to allocate any loop costs to nonregulated services when the service shares the voice loop. In cases where the loop is not shared, it would be appropriate to allocate loop costs to nonregulated service.

4. Facilities-based broadband providers (cable, satellite and wireless) and ISPs should be required to contribute to universal service.

The Commission has established in the NPRM that it has the authority to assess facility-based broadband providers and ISPs for universal service. In the NPRM, the Commission states, “[s]pecifically, section 254(d) of the Act provides the Commission the permissive authority to require “[a]ny other provider of interstate telecommunications” to contribute to universal service if required by the public interest.

²³ Id., para 133

²⁴ Id., para 152

²⁵ The Commission has exercised this authority based on the fact that certain providers, like telecommunications carriers, “have built their businesses or part of their businesses on access to the [public switched network], provided telecommunications in competition with common carriers, and their non-common carrier status results solely from the manner in which they have chosen to structure their operations.” ²⁶ Any facilities-based and possibly non-facilities based broadband service provider and ISP would pass this threshold test. Internet service is dependent upon the public switched network for end-users to access the Internet and other end-users that also subscribe to Internet services. Voice over Internet Protocol (VoIP), is growing and in the near future could cause a significant migration of voice traffic from the traditional telephone network to the Internet. The Internet is clearly a competitive alternative to telecommunications services. Also, as the Commission acknowledges, “telecommunications carriers that provide telecommunications services, including broadband transmission services are subject to contribution requirements.”²⁷ Fundamental fairness dictates that all facilities-based providers of broadband and Internet information services should be assessed for Universal Service contributions.

Providers that are currently not being assessed for Universal Service contributions should be assessed an amount that is approximately equivalent to what telecommunications service providers are currently assessed. Telecommunications service providers are assessed based on their end-user interstate revenues. Since the Commission has declared Internet access as an interstate service, most charges for broadband Internet access are assessed for USF contributions. An approach for assessing other facility-based

²⁵ NPRM para. 71

²⁶ Id.

²⁷ Id., para 72

broadband providers and ISPs would be to determine an equivalent amount per line based on revenues reported by telecommunications service providers related to broadband Internet access. This amount per line times the number of facility-based broadband connections served by the provider could determine the assessment amount. The Commission could calculate the assessment per line amount on a statewide or nationwide basis. Alternatively, broadband and ISP service providers could elect to report their specific revenues associated with providing both broadband and Internet information service.

If the Commission were to adopt a connection-based assessment, rather than a revenue-based assessment, the amount per line could be used to establish the connection-based charge. However, all providers, including telecommunications service providers would be assessed the per-line amount on a going-forward basis. This approach would ensure that all facility-based providers of broadband Internet access and ISP information services pay in an equitable manner and avoid competitive inequities.

The Commission also seeks comment regarding how they “may ensure that services supported by universal service bear no more than a reasonable portion of the costs associated with facilities used to provide both supported services and unsupported Internet access.” If the Commission were to deregulate wireline broadband Internet access by declaring it an information service, they want to ensure that costs of the network are properly allocated between regulated Title II services and Title I information services to comply with the 254(k) requirements. Section 254(k) of the Act prohibits telecommunications carriers from using services that are not competitive to subsidize services that are subject to competition. Section 254(k) also requires that services supported by universal service bear no more than a reasonable share of joint and common

costs of the facilities used to provide these services. Specific comments are sought regarding the sufficiency of the existing rules and policies in a broadband environment and whether those rules should be modified in order to meet the requirements of section 254(k).

Currently, the majority of the rural LECs provide broadband or DSL Internet Access service pursuant to the provisions contained NECA Tariff No. 5, Section 8 and rates contained in Section 17. DSL Access Service in the Tariff can be sold directly to end-users on a retail basis or to Internet service providers on a wholesale basis. When the service is sold to the end- user, the end- user must specify its ISP, if connectivity to that ISP is available. The facilities necessary to provide DSL Internet access are regulated and sold separately out of the NECA tariff. The rates contained in Section 17 are designed to recover the costs associated with providing DSL access services and therefore preclude universal services or any other services from subsidizing DSL access services. LEC affiliates or other Internet service providers generally provision DSL-based Internet service and structure their rates to cover the cost of DSL access service and Internet services. The rural LECs' facilities that deploy DSL Internet access are regulated today and the associated NECA Tariffs and Rates meet the requirements of 254(k). Further, the NECA pooling process provides the rural LECs with administrative efficiencies and a mechanism to recover costs while still providing DSL access services at reasonable rates. For the rural LECs, there is no compelling reason to change the existing structure and deregulate DSL access facilities.

**THE COMMISSIONS GOALS ARE SATISFIED ONLY IF WIRELINE
BROADBAND INTERNET ACCESS IS DEFINED AS A
TELECOMMUNICATIONS SERVICE**

In order to evaluate the information service versus telecommunications service classification of wireline broadband Internet access service, the FCC established the following principles and policy goals:

1. Encourage the ubiquitous availability of broadband to all Americans.²⁸
2. In order to encourage broadband's evolution and competition across multiple platforms, and thereby ensure that the needs and demands of the consuming public are met, broadband broadly includes any and all platforms capable of fusing communications power, computing power, high-bandwidth intensive content, and all access to the Internet.²⁹
3. Broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive environment. Regulatory uncertainty and unduly burdensome regulatory costs should be limited.³⁰
4. Develop an analytical regulatory framework that is consistent, to the extent possible, across multiply broadband platforms.³¹
5. Continue to pursue and protect the core objectives of universal service.³²

Apparently, the Commission has concluded on a tentative basis that these goals are satisfied if wireline broadband Internet service and the facilities that support that service are classified as information service and deregulated. FW&A believes that the

²⁸ Id., paragraph 3.

²⁹ Id., paragraph 4.

³⁰ Id., paragraph 5.

³¹ Id., paragraph 6.

³² Id., paragraph 65.

Commission should reevaluate this tentative conclusion for the reasons previously discussed and because the goals articulated by the Commission are not met by classifying wireline broadband access as an information service.

It is much more likely that broadband deployment will be facilitated and the goal of ubiquitous availability advanced by classifying wireline broadband access as a telecommunications service because all ISP's, not just those affiliated with the broadband facilities provider, will have broadband access to end-users on the same terms and conditions. Competition among ISP's will be encouraged, not curtailed. This competition will lead to an increased number of competitive ISP options for consumers. The consequence should be greater consumer demand for wireline broadband telecommunications service access for ISP information services. Alternatively, if the Commission inappropriately classifies wireline broadband Internet access as an information service, the Act's goal of ubiquitous availability of broadband service to all Americans will be hindered and possibly not met in rural areas because:

- Consumers will be unable to select an ISP of their choice. Instead, they will be required to use the ISP affiliated with the incumbent LEC integrated broadband access service/ISP information service.
- Competition among ISPs will be curtailed. Unless an ISP, in particular smaller ISPs are able to ally themselves with a BOC, they will likely be barred from providing ISP Internet information services via broadband facilities. Instead they will be relegated to only offering dial-up Internet access service.
- Broadband deployment may be curtailed because the consumer push for broadband, through the ISP of their choice, may be diminished.

- Rural LECs that typically do not offer integrated broadband access service and ISP Internet information service may have difficulty incenting or finding unaffiliated ISPs that will serve their rural areas.

In conjunction with classifying wireline broadband access as a telecommunications service, a rule change that the Commission should seriously consider is the elimination of its line sharing and line splitting rules. Elimination of these rules will provide an incentive, not a disincentive for incumbent LECs to deploy broadband facilities in not only urban but also high cost rural areas. CLECs will, like ISPs still have wireline broadband access to end users on the same terms and conditions as the incumbent LEC and its affiliated ISP's, if any, through the Computer II and III requirements.

A consistent analytical framework across the various broadband platforms currently exists and is not harmed by continuing to classify wireline broadband Internet access as a telecommunications service. Cable modem, satellite and wireless providers of access to ISPs, like incumbent LECs, either self provision facilities for their affiliated ISPs or sell those facilities to non-affiliated ISPs for their use in providing information services to end-users. In the cable modem proceeding, further consistency can be assured by requiring cable providers to allow equal access for ISPs to its broadband transmission facilities on the same terms and conditions.

Classifying wireline broadband Internet access facilities as a telecommunications service, maintaining the current Computer II and III requirements and eliminating the line sharing and line splitting requirements will allow incumbent LEC broadband services to exist in a minimal regulatory environment and minimize regulatory burdens and costs. On the other hand, classifying these facilities as information and requiring additional Part 64 and Section 254(k) cost allocations will significantly increase the costs of incumbent LECs.

Finally, the preservation of universal service will be enhanced if all providers of broadband service, as well as the ISP providers of information services, are required to contribute to universal service and to contribute on a consistent and non-discriminatory basis. Hopefully this issue will be dealt with either in this proceeding or in the Commission's universal service contribution proceeding.

Respectfully submitted on behalf of the ILECs by,

Frederic G. Williamson
President, Fred Williamson & Associates, Inc
2921 East 91st Street, Suite 200
Tulsa, OK. 74137-3355
Telephone: (918) 298-1618

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